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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff-Applicant, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (CGM) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC and the Chapter 7 Estate of Bernard L. Madoff, Plaintiff, v. BNP PARIBAS ARBITRAGE SNC, Defendant.	Adv. Pro. No. 11-02796 (CGM)

MEMORANDUM OF LAW IN SUPPORT OF
BNP PARIBAS ARBITRAGE SNC'S MOTION TO DISMISS

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BNP Paribas Arbitrage SNC ("BNPP Arbitrage"), by and through its undersigned counsel, submits this memorandum of law in support of its motion to dismiss the Amended Complaint, ECF No. 100 (the "Amended Complaint") with prejudice filed by Irving H. Picard, Trustee (the "Trustee") for the Liquidation of Bernard L. Madoff Investment Securities LLC ("BLMIS") pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(2).

PRELIMINARY STATEMENT[1]

The Trustee's boilerplate Amended Complaint—over half of which is copied and pasted from other actions—fails to plead sufficient facts to support a plausible claim for relief. Therefore, for the following reasons, the Amended Complaint should be dismissed.

First, the Amended Complaint fails to establish that this Court has personal jurisdiction over BNPP Arbitrage. The Trustee has failed to plead facts showing that BNPP Arbitrage—a foreign entity—is "at home" in New York, or that BNPP established sufficient "minimum contacts" in the United States in respect of the alleged transfers. On the contrary, the relevant facts underlying the Amended Complaint are all foreign. The Trustee alleges BNPP Arbitrage, a French financial institution, through a division of its French parent, allegedly extended a credit facility to Santa Barbara, a BVI-based "fund that was invested entirely" in Harley. Harley itself was a Cayman Island investment company, from which BNPP Arbitrage allegedly received $1.054 billion in subsequent transfers that the Trustee claims now seeks to claw back.

Second, the face of the Amended Complaint itself evinces that BNPP Arbitrage is entitled to the protection of the "good faith" and "for value" defense available under section 550(b) of the Bankruptcy Code, 11 U.S.C. § 550(b). The Amended Complaint plainly

[1] Capitalized terms used in the Preliminary Statement have the meaning ascribed to them herein.

establishes that BNPP Arbitrage gave value for the alleged transfers, and is entirely devoid of any allegation that BNPP Arbitrage was on inquiry notice of Madoff's fraud, or that a diligent inquiry would have been sufficient to uncover it.

Third, the Amended Complaint does not demonstrate that the Subsequent Transfers comprise customer property, which requires a sufficient link between the initial transfers from BLMIS to Harley and the Subsequent Transfers he seeks to claw back. Far from satisfying that burden, the Amended Complaint presents unexplained and unconnected exhibits that do not even try to establish that the Subsequent Transfers constitute customer property.

Fourth, the Trustee has failed to adequately pled that the Initial Transfers are avoidable under section 548(a)(1). Not only should the Trustee not be permitted to rely on the flawed premise of the so-called "Ponzi scheme presumption" to avoid his burden of pleading actual fraud (which the Amended Complaint otherwise does not even attempt to do), but his failure to allege that BNPP Arbitrage received any fictitious profits also forecloses any claim that the transfers were constructively fraudulent as well.

Finally, the safe harbor codified under section 546(e) shields all of the Subsequent Transfers from the Trustee's clawback claims, because each was a settlement payment in connection with a securities contract made by, to, or for the benefit of, a covered entity under the statute.

For all of these reasons and as discussed more fully below, the Amended Complaint fails as a matter of law, and should be dismissed with prejudice.

BACKGROUND

Although the Amended Complaint is so barebones as to be essentially inscrutable, the Trustee's complaint seems to stem from an alleged relationship between BNPP Arbitrage;

Santa Barbara Holdings Ltd. ("Santa Barbara"), a BVI-based fund; and Harley International (Cayman) Ltd. ("Harley"), a Caymanian BLMIS "feeder" fund that is alleged to have invested in BLMIS. The complaint's factual allegations, threadbare and confusing as they are, appear to loosely assert that this relationship involved (1) a 2004 credit facility and credit facility agreement (the "Credit Facility" and the "Credit Agreement," respectively) between Santa Barbara as borrower, non-party BNP Paribas S.A. as lender, and non-party BNP Paribas Securities Corp. ("BNPP Sec. Corp.") as collateral agent, in connection with Santa Barbara's investments with Harley; and/or (2) subscription agreements between Harley and unspecified investors.

The Amended Complaint seeks to claw back approximately $1.05 billion in alleged subsequent transfers (the "Subsequent Transfers") that Harley allegedly made to BNPP Arbitrage between March 2008 and November 2008. Am. Compl. Ex. C. Confusingly, these transfers are not alleged to have been made pursuant to either the Credit Facility or the subscription agreements with unspecified investors. The Trustee makes no effort to plead on what basis BNPP Arbitrage allegedly received the transfers, relying solely on conclusory and non-specific allusions to "investments." Am. Compl. ¶ 78.

The Original Complaint (the "OC") in this case was filed on November 3, 2011, and its claims contain a similar paucity of factual information.[2] The claims undergirding the OC were dismissed in November 2016.[3] Following the Second Circuit's decision on

[2] Compl., *Picard v. BNP Paribas Arbitrage SNC*, Adv. Pro. No. 11-02796 (Bankr. S.D.N.Y. Nov. 3, 2011), ECF No. 1 (the "OC").

[3] *SIPC v. BLMIS*, No. 08-01789 (SMB), 2016 WL 6900689 (Bankr. S.D.N.Y. Nov. 22, 2016) (the "Extraterritoriality Decision").

extraterritoriality and comity issues in 2019,[4] and after a fallow period, the Trustee filed the Amended Complaint, asserting a single cause of action under The Securities Investor Protection Act ("SIPA") and section 550 against BNPP Arbitrage, 11 U.S.C § 550. Although BNPP Arbitrage recognizes that the Court is required to accept the well pled allegations in the Amended Complaint as true for the limited purposes of evaluating arguments in a motion to dismiss, BNPP Arbitrage vigorously contests all of the Trustee's vague and conclusory factual assertions.[5]

LEGAL STANDARD

The Court must dismiss a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure (the "Federal Rules"), Fed. R. Civ. P. 12(b)(6), "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007). A claimant's allegations "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plausible claim for relief pleads facts "that allow . . . the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Although the Court must accept well-pleaded factual allegations as true, it need not accept assertions that are unsupported by factual allegations, *Id.* at 678–79, nor a "legal conclusion couched as a factual allegation," *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

To survive a motion to dismiss under Rule 12(b)(2), "the plaintiff bears the burden to make a prima facie showing that jurisdiction exists." *Lehman Bros. Special Fin. Inc.*

[4] The Second Circuit reversed the Extraterritoriality Decision in 2019, reviving the Trustee's claims. *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85 (2d Cir. 2019).

[5] *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009).

v. Bank of Am. N.A. (*In re Lehman Bros. Holdings Inc.*), 535 B.R. 608, 618 (Bankr. S.D.N.Y. 2015). "Conclusory allegations lacking factual specificity . . . do not satisfy plaintiff's burden" of showing a prima facie case for exercising personal jurisdiction. *Alki Partners, L.P. v. Vatas Holding GmbH*, 769 F. Supp. 2d 478, 487 (S.D.N.Y. 2011), *aff'd sub nom. Alki Partners, L.P. v. Windhorst*, 472 F. App'x 7 (2d Cir. 2012).

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER BNPP ARBITRAGE

The Amended Complaint does not contain allegations sufficient to show that BNPP Arbitrage is subject to the "general" personal jurisdiction of this Court. as it fails even to try to demonstrate that BNPP Arbitrage is "at home" in New York (or any other State of the United States). General jurisdiction exists only when the defendant is "at home" in the forum, either because it is incorporated under the laws of the forum or has its principal place of business there. *See Daimler AG v. Bauman*, 571 U.S. 117, 136–37 (2014). Here, BNPP Arbitrage is "a general partnership incorporated and organized under the laws of France as a *société en nom collectif*" (Am. Compl. ¶ 51), and is a wholly owned subsidiary of BNP Paribas, a French financial institution. Numerous public filings confirm Paris as the site of BNPP Arbitrage's principal place of business. The Trustee does not—because he cannot—credibly allege that BNP Arbitrage is "at home" in New York. *See Hertz Corp. v. Friend*, 559 U.S. 77, 93, 96 (2010) (holding that that the principal place of business is a "single place," and the place which is typically held out to the public as "the corporation's main place of business" or where its "top officers" who "direct [the company's] activities" are situated). Accordingly, the Trustee apparently seeks to show that this Court possesses "specific" personal jurisdiction over BNPP Arbitrage. That effort fails.

Specific jurisdiction requires an analysis of the connection between the defendant, the forum, and the claim. *See SPV OSUS, Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) ("The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation.") (quoting *Walden v. Fiore*, 571 U.S. 277, 277, 283, 287, 291 (2014) (cleaned-up and internal quotations omitted). Under this framework, the Trustee's attempts to shoehorn a finding of personal jurisdiction into this entirely foreign fact pattern fall short: At its core, the Trustee's allegations relate to wire transfers that occurred between a French bank and a Caymanian investment fund in connection with a Credit Facility with a BVI-based borrower.

First, the "'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Walden v. Fiore*, 571 U.S. 277, 285 (2014). Here, the Trustee's allegations impermissibly focus on Harley's contacts with BLMIS in the forum, not BNPP Arbitrage's contacts, and therefore fail the test. Where BNPP Arbitrage "never allegedly directed any activity toward the United States," personal jurisdiction cannot be found.

Second, the relevant contacts that purportedly support the exercise of personal jurisdiction must be purposely directed towards the forum, as opposed to "fortuitous" or "attenuated." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985) (quoting *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 297, 299 (1980)). The contacts must also relate to "the wrong alleged" and be significant enough that a reasonable person would foresee that their "conduct and connection with the forum State are such that he should reasonably anticipate being haled into the court there." *Id.* Under this framework, the Trustee cannot claim that BNPP Arbitrage has sufficient relevant contacts because it allegedly invested in Harley "knowing[]"

that Harley would in turn invest in BLMIS in New York, Am. Compl. ¶ 77, or because the transfers were routed through New York-based correspondent bank accounts, *id*. ¶¶ 62, 80.

There is no "intent" or "knowledge" exception to the rule that specific personal jurisdiction must be premised on BNPP Arbitrage's purposeful availment of the forum, rather than on Harley's investment in BLMIS. Such an exception would run squarely against *Walden*, in which the Supreme Court held that allegations that the defendant police officer knew Plaintiff "had a significant connection to [the forum state]," *Walden*, 571 U.S. at 282 n.3, were insufficient to support the exercise of jurisdiction because such an approach would "impermissibly allow a *plaintiff's* contacts with the defendant and forum to drive the jurisdictional analysis." *Id.* at 289 (emphasis added).[6]

Nor is the use of New York-based correspondent bank accounts sufficient in this case, because that alleged conduct is neither purposeful, nor proximate enough to establish personal jurisdiction. *See Asahi Metal Indus. Co. v. Superior Ct. of Cal., Solano Cnty.*, 480 U.S. 102, 112 (1987) ("The substantial connection . . . between the defendant and the forum . . . necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State*.") (quotation marks omitted) (emphasis in original); *Hau Yin To v. HSBC Holdings PLC*, No. 15CV3590-LTS-SN, 2017 WL 816136, at *6 (S.D.N.Y. Mar. 1, 2017); *Hill v. HSBC Bank PLC*, 207 F. Supp. 3d 333, 340 (S.D.N.Y. 2016) (transmission of information and funds to and from BLMIS to be "incidental consequences of fulfilling a foreign contract"). Furthermore, these alleged contacts do not relate to "the wrong alleged" in the Amended Complaint, because the "wrong" in question is the fraudulent conduct perpetuated

[6] *See also, e.g.*, *In re Mexican Gov't Bonds Antitrust Litig.*, No. 18-CV-2830, 2020 WL 7046837, at *3–4 (S.D.N.Y. Nov. 30, 2020) (holding that in the absence of defendant's contact with forum, neither attempt to profit from conduct underlying the claim nor foreseeability of in-forum harm was sufficient to establish jurisdiction).

by BLMIS—conduct that BNPP Arbitrage played no role in, and to which it too fell victim. *See* Am. Compl. § IV (describing Madoff's fraud).

Third, the contacts must be sufficiently related to the claim at bar. *U.S. Bank Nat'l Ass'n v. Bank of Am. N.A.*, 916 F.3d 143, 150 (2d Cir. 2019) (noting that to establish personal jurisdiction over a nonresident defendant, "the plaintiff's claims must arise out of or relate to the defendant's forum conduct"). The Trustee's allegations again fail under this prong: the Amended Complaint's laundry list of activities includes irrelevant purported contact with a number of funds that are not the subject of this action, such as the assertion that "BNP Paribas Arbitrage invested in and/or received transfers of customer property from at least seven BLMIS feeder funds," not at issue in this case. Am. Compl. ¶ 53. Under the "minimum contacts" test, this unrelated conduct cannot be the basis of an assertion of specific jurisdiction by the Trustee with respect to the claims included in the Amended Complaint. *See U.S. Bank Nat'l Ass'n*, 916 F.3d at 150.

Similarly, the alleged facts relating to the forum selection clauses in the credit facility agreements (*see, e.g.*, Am. Compl. ¶ 70) are also irrelevant to the claim in this action. To begin, the Trustee has not even alleged that BNPP Arbitrage is a party to these credit facility agreements—presumably because he is aware that the operative agreements confirm that it is not—and thus is not bound by any forum selection clause contained therein. Moreover, even if BNPP Arbitrage were a party to the credit facility agreements (it is not), this Court has already held in an analogous action involving the liquidators for the Fairfield Funds that the New York choice of forum provisions in the Fairfield Funds subscription agreement were irrelevant to disputes concerning redemptions made under a different contract (specifically, the Fairfield Funds' Articles of Association). *See Fairfield Sentry Ltd. v. Theodoor GGC Amsterdam* (*In re*

Fairfield Sentry Ltd.), No. 10-13164 (SMB), 2018 WL 3756343, at *11 (Bankr. S.D.N.Y. Aug. 6, 2018) (adhering to the holding in *Fairfield Sentry Ltd. v. Migani* [2014] UKPC 915 that the subscription agreement was irrelevant to actions to claw back the redemption payments); *see also Lavazza Premium Coffees Corp. v. Prime Line Distribs. Inc.*, No. 20 Civ. 9993 (KPF), 2021 WL 5909976, at *7 (S.D.N.Y. Dec. 10, 2021) (rejecting enforcement of forum selection clause for a non-party plaintiff bringing claims outside the clause's scope). The Trustee's claims are likewise insufficiently linked to non-party BNPP S.A. and non-party BNPP Sec. Corp.'s credit facility agreements with Santa Barbara, given that neither Harley, BNPP Arbitrage, nor BLMIS is even a party to those agreements.

Because here, the Trustee's allegations fail to establish the requisite connection between BNPP Arbitrage, the forum, and the claim, the Trustee's Amended Complaint should be dismissed with respect to BNPP Arbitrage for lack of personal jurisdiction.

II. THE TRUSTEE'S CLAIMS SHOULD BE DISMISSED FOR FAILURE TO PLEAD THAT BNPP ARBITRAGE RECEIVED BLMIS CUSTOMER PROPERTY

Under section 550(a)(2), a trustee may only claw back from a subsequent transferee the property (or value of the property) that was transferred in the initial transfer. *See SIPC v. BLMIS*, 531 B.R. 439, 473 (Bankr. S.D.N.Y. 2015). In order to state a claim under section 550(a), "the plaintiff has the burden of tracing funds it claims to be property of the estate." *Silverman v. K.E.R.U. Realty Corp.* (*In re Allou Distribs., Inc.*), 379 B.R. 5, 30 (E.D.N.Y. 2007) (citing *IBT Int'l Inc. v. N. (In re Int'l Admin. Servs.)*, 408 F.3d 689, 708 (11th Cir. 2005)); *see also Lyon v. Eiseman* (*In re Forbes*), 372 B.R. 321, 334 (B.A.P. 6th Cir. 2007) ("[I]t is generally the [t]rustee's burden to trace the funds he claims are property of the estate."). At a minimum, "[t]he Trustee must allege facts that support the inference that the funds at issue

originated with the BLMIS, and contain the 'necessary vital statistics'" that put BNPP Arbitrage on some notice as to what funds are being referred to. *Picard v. Shapiro* (*In re BLMIS*), 542 B.R. 100, 119 (Bankr. S.D.N.Y. 2015).

Here, the Trustee's allegations lack the necessary detail as to the "who, when, and how much" of the transfers and, as such, are insufficient to support the applicable pleading standard. The Trustee's conclusory allegations that the initial transfers from BLMIS to Harley (as alleged in the Amended Complaint, the "Initial Transfers") "were and continue to be customer property within the meaning of 15 U.S.C § 78*lll*(4)," Am. Compl. ¶ 82, and that "prior to the filing date, Harley transferred a portion of the Initial Transfers to BNP Paribas Arbitrage," *id.* ¶ 87, are insufficient to meet *Twombly* and *Iqbal*'s pleading standards. *Iqbal*, 556 U.S. at 678. The Court need not accept a "legal conclusion couched as a factual allegation." *Papasan*, 478 U.S. at 286. Because the Amended Complaint fails to specify which, or what portion, of the Initial Transfers were subsequently transferred by Harley to BNPP Arbitrage, it necessarily fails to show that BNPP Arbitrage received customer property.

The exhibits add nothing of substance to the threadbare allegations in the Amended Complaint regarding the nature of the transfers. To the contrary, they contain no information whatsoever that could rationally tie the Initial Transfers listed in Exhibit B—spanning more than twenty pages of minute text—to the alleged list of Subsequent Transfers in Exhibit C, which themselves contain only the dates and amounts of each transfer. In effect, the Trustee relies on the Court to take his conclusory claims at face value and fill in the blanks on his behalf. Not only does this approach contravene applicable law, the Trustee's own allegations establish that such inferences are not warranted. Indeed, the Amended Complaint includes several references to "investors" in Harley and Fix Asset Management, which provided

independent sources of funding, casting doubt on the Trustee's inference that every dollar that flowed to BNPP Arbitrage constituted property of BLMIS, as opposed to property of Harley customers other than BNPP Arbitrage. Am. Compl. ¶ 60.

III. BNPP ARBITRAGE IS ENTITLED TO A "GOOD FAITH" AND "FOR VALUE" DEFENSE

The Trustee's Amended Complaint should also be dismissed because BNPP Arbitrage received the subsequent transfers "for value," in good faith, and without knowledge of the voidability of the transfers under section 550(b). The Trustee's own pleadings conclusively demonstrate that BNPP Arbitrage is entitled to this defense.

A. *BNPP Arbitrage Plainly Received the Alleged Transfers "For Value"*

To support a defense under section 550(b), a subsequent transferee need not give reasonably equivalent value. *See Enron Corp. v. Ave. Special Situations Fund II, LP (In re Enron Corp.)*, 333 B.R. 205, 236 (Bankr. S.D.N.Y. 2005) ("There is no requirement that the value given by the transferee be a reasonable or fair equivalent."). The value provided need only be enough consideration sufficient to support a contract. *Picard v. ABN Amro Bank N.A.*, Adv. Pro. No. 08-01789, 2020 WL 1584491, at *9 (Bankr. S.D.N.Y. Mar. 31, 2020). Here, regardless of how the Amended Complaint is read, it is facially evident that BNPP Arbitrage gave value to Harley in exchange for the transfers. If the Trustee intends to allege that the Subsequent Transfers were received pursuant to the Credit Facility, then BNPP Arbitrage gave value because loaning funds that are repaid by means of a subsequent transfer from a Feeder Fund has previously been found to constitute sufficient value for purposes of section 550(a). *See Picard v. Citibank, N.A.*, 608 B.R. 181, 196 (Bankr. S.D.N.Y. 2019); *ABN Amro Bank N.A.*, 2020 WL 1584491, at *9. If, alternatively, the Trustee intends to allege that the Subsequent Transfers were received pursuant to unspecified subscriptions and redemptions, then this too would constitute

value, because executing subscriptions and surrendering shares in feeder funds for redemptions has been previously found to be sufficient to establish that a defendant gave value. *ABN Amro Bank N.A.*, 2020 WL 1584491, at *9. (collecting cases).

B. *BNPP Arbitrage Acted in Good Faith and Without Knowledge of Madoff's Fraud*

The second component of the section 550(b) defense is met when the transferee receives the funds in good faith and without knowledge of the voidability of the transfer. 11 U.S.C. § 550(b). Under section 550(b), the Court must evaluate three factors when determining whether a transferee received transfers in good faith. *See Picard v. Citibank, N.A.*, 12 F.4th 171, 191–92 (2d Cir. 2021): (1) "[w]hat facts the defendant actually knew; this is a subjective inquiry, not 'a theory of constructive notice;'" (2) "[w]hether these facts put the transferee on inquiry notice of the fraudulent purpose behind a transaction—that is, whether the facts the transferee knew would have led a reasonable person in the transferee's position to conduct further inquiry into a debtor-transferor's possible fraud;" and (3) "[w]hether 'diligent inquiry [by the transferee] would have discovered the fraudulent purpose' of the transfer." *Id.*

The Amended Complaint fails to make any allegation that BNPP Arbitrage had inquiry notice of Madoff's misconduct. Instead, the Trustee dedicates over half of the Amended Complaint to boilerplate language rehashing the history of Madoff's scheme. He makes no effort to connect these facts to any awareness or knowledge by BNPP Arbitrage, nor does he attempt to allege that Harley had special knowledge of Madoff's fraud that was communicated to BNPP Arbitrage. To the contrary, the allegations in the Amended Complaint demonstrate that Madoff scrupulously shielded his fraud from scrutiny by means of deceptive practices and reporting which withstood examination from, among others, the U.S. Securities and Exchange Commission. *See, e.g.*, Am. Compl. ¶ 23–24. Taking the Trustee's allegations at face value, the

only reasonable conclusion is that, in the face of such pervasive deception, BNPP Arbitrage could not have been on inquiry notice of the fraud (and the Trustee's essentially non-existent allegations with respect to BNPP Arbitrage's knowledge bear this out).

Moreover, even if the Trustee plausibly alleged that BNPP Arbitrage was on inquiry notice of Madoff's fraud, which he has not, BNPP Arbitrage would still have acted in good faith unless a "diligent inquiry" would have uncovered the fraud, which this Court has already effectively found not to be the case. In Judge Bernstein's 2018 decision with respect to Trustee's 2017 allegations against BNPP Arbitrage, he declined to find that BNPP Arbitrage and other BNPP entities were willfully blind to Madoff's fraud, despite the complaint's dozens of pages of allegations of so-called "red flags," finding that "[r]ather than turn a blind eye, the . . . allegations show that the Defendants engaged in ongoing due diligence and received repeated confirmations that the transactions were real." *Picard v. BNP Paribas S.A.*, 594 B.R. 167, 205 (Bankr. S.D.N.Y. 2018); *see* Am. Compl., *Picard v. BNP Paribas S.A.*, Adv. Pro. No. 12-01576 (Bankr. S.D.N.Y. Aug. 30, 2017), ECF No. 100, ¶¶ 75–83 (describing the extensive diligence efforts of the relevant BNPP defendants, including BNPP Arbitrage, with respect to Madoff investments).

Because the Trustee's own pleadings and this Court's prior decision demonstrate that BNPP Arbitrage received these transfers both for value and in good faith without knowledge of the fraud under section 550(b), the Amended Complaint should be dismissed.

IV. THE INITIAL TRANSFERS ARE NOT AVOIDABLE

In order for the Trustee to claw back under section 550(a), he must first establish that the transfers are avoidable and avoided. *Citibank*, 12 F.4th at 197. In *In re JVJ Pharmacy, Inc.*, the district court held that the relevant "[t]ransfers must be avoided under § 548(a)(1) before

the Trustee can invoke § 550 to seek recovery." 630 B.R. 388, 401 (S.D.N.Y. 2021). As a subsequent transferee, BNPP Arbitrage is entitled to raise defenses to avoidance that are available to the initial transferees. *SIPC v. BLMIS (In re BLMIS)*, 501 B.R. 26, 30 (S.D.N.Y 2013) ("Thus, if, as here, the initial transferee settled with the Trustee or failed to raise a given defense, the subsequent-transferee defendant may assert any defenses to avoidance available to the initial transferee, even if the initial transferee did not raise or resolve those defenses."). Because the Trustee has not adequately pleaded the avoidability of the Initial Transfers, his clawback claims for the alleged subsequent transfers fail.

A. *The Trustee Should Not Be Allowed to Rely on the "Ponzi Scheme Presumption" to Avoid His Pleading Burden Under Section 548(a)(1)(A)*

Section 548(a)(1)(A) requires the Trustee to plead that BLMIS "made" each "transfer" challenged under that provision "with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made." Because "'actual intent to hinder, delay or defraud' constitutes fraud, it must be pled with specificity, as required by Fed. R. Civ. P. 9(b)." *Sharp Int'l Corp. v. State St. Bank & Trust Co.* (*In re Sharp Int'l Corp.*), 403 F.3d 43, 56 (2d Cir. 2005) (citation omitted); 11 U.S.C. § 548(a)(1)(A).

Rather than pleading facts establishing the fraudulent intent behind each transfer, as required by section 548(a)(1)(A), the Trustee appears to rely upon the presumption "that transfers from a debtor in furtherance of a Ponzi scheme are made with fraudulent intent rather than to satisfy an antecedent debt." *Citibank*, 12 F.4th at 201 (Menashi, J., concurring). Without the "Ponzi scheme presumption," the Amended Complaint alleges nothing whatsoever about BLMIS's intent in making the specific transfers at issue here, and certainly not that they were made with the requisite actual fraudulent intent.

Although this Court and the District Court have, at times, accepted the "Ponzi scheme" presumption in actions commenced by the Trustee, Judge Menashi's concurring opinion in *Citibank* made clear that its existence and application are not well-settled, and persuasively explained why the "Ponzi scheme presumption" represents a "questionable" application of fraudulent transfer statues. *Id.* at 202.

First, section 548(a)(1)(A) does not mention Ponzi schemes, nor does it authorize courts to relax (or functionally eliminate) the Trustee's pleading burden in such cases, which otherwise would require specific allegations regarding the intent requirements.

Second, fraudulent transfer cases require an "asset-by-asset and transfer-by-transfer" inquiry—one that requires proof of "the elements of a fraudulent transfer with respect to each transfer, rather than relying on a presumption related to the form or structure of the entity making the transfer"—because the statutory focus is "on individual transfers, rather than a pattern of transactions that are part of a greater 'scheme.'" *Finn v. All. Bank*, 860 N.W.2d 638, 647 (Minn. 2015) (construing Minnesota UFTA provision that is virtually identical to section 548(a)(1)(A)); *see also Citibank*, 12 F.4th at 201 (Menashi, J., concurring).

Third, the Ponzi scheme presumption is based on the hypothesis that whenever a Ponzi scheme operator "makes payments to present investors," it does so for the purpose of "attract[ing] new investors." *Merrill v. Abbott* (*In re Indep. Clearing House Co.*), 77 B.R. 843, 860 (D. Utah 1987) (en banc). But that premise is unlikely to hold true in all cases or at all times, especially in the later stages of a long-running scheme like Madoff's, which began decades prior to its collapse. *See Picard v. Legacy Cap. Ltd.* (*In re BLMIS*), 603 B.R. 682, 691 (Bankr. S.D.N.Y. 2019).

Fourth, the Ponzi scheme presumption, as Judge Menashi explained, "improperly treats [preference claims under section 547] as fraudulent transfers," *Citibank*, 12 F.4th at 201, thereby "obscur[ing] the essential distinction between fraudulent transfers and preferences," and the presumption has accordingly been rejected by courts on these grounds. *Id.* at 202; *see also Lustig v. Weisz & Assocs., Inc.* (*In re Unified Com. Cap., Inc.)*, 260 B.R. 343, 350 (Bankr. W.D.N.Y. 2001).

Finally, the Ponzi scheme presumption conflicts with Rule 9(b), which requires particularity in pleading how each transfer was made with actual intent to defraud. *See, e.g.*, *Sharp*, 403 F.3d at 56. If such exceptions are to be created, Congress—not the courts—should create them. *See Unified*, 260 B.R. at 350 (cited approvingly in *Citibank*, 12 F.4th at 202 (Menashi, J., concurring)).

In the absence of this presumption, the Amended Complaint is devoid of any allegation that could establish BLMIS acted with the requisite intent to "hinder, delay or defraud" creditors. Accordingly, the Trustee has failed to meet his pleading burden that the transfers are avoidable under section 548(a)(1)(A) and the Amended Complaint should be dismissed.

B. ***The Transfers Are Not Avoidable Under Section 548(a)(1)(B)***

Just as the Trustee has failed to plausibly allege the voidability of the transfers under section 548(a)(1)(A), he has likewise failed to meet the requirements of section 548(a)(1)(B), which permits the Trustee to claw back transfers made for less than reasonably equivalent value. 11 U.S.C. § 548(a)(1)(B). When seeking to avoid transfers under section 548(a)(1)(B), the Trustee bears the burden of showing that each element of the statute has been met. *In re Bennett Funding Grp., Inc.*, 232 B.R. 565, 570 (Bankr. N.D.N.Y. 1999).

The Amended Complaint includes no allegations that BNPP Arbitrage or Harley gave less than "reasonably equivalent value" to BLMIS in exchange for any of the alleged transfers. *See In re Dreier LLP*, 452 B.R. 391, 436 (Bankr. S.D.N.Y. 2011). It is axiomatic that a return of principal constitutes "reasonably equivalent value," and the Amended Complaint includes no allegations that the transfers to BNPP Arbitrage comprised "fictitious profits" received in excess of principal.[7] *See id.* at 401. As a result, none of the transfers alleged by the Trustee are avoidable, and his clawback claims should therefore be dismissed.

V. THE TRUSTEE'S CLAIMS ARE BARRED BY THE SAFE HARBOR OF SECTION 546(E)

Section 546(e) provides that the Trustee may not avoid a transfer that qualifies as a settlement payment "made by or to (or for the benefit of) a . . . stockbroker, financial institution, [or] financial participant . . . in connection with a securities contract." The lone statutory exception concerns transfers avoided under section 548(a)(1)(A).[8] There is no question that the statutory requirements of the section 546(e) safe harbor provision are satisfied here: (1) the underlying agreement was a securities contract within the meaning of the statute; (2) the transfers under the agreement were "settlement payments"; and (3) the transfers were made by, to, and for the benefit of a covered entity under section 546(e). Because the transfers fall within the safe harbor, the Amended Complaint should be dismissed.

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[7] Indeed, the Trustee's own complaint against Harley confirms that the fund received no fictitious profits. Compl., *Picard v. Harley International (Cayman) Limited*, Adv. Pro. No. 09-01187 (Bankr. S.D.N.Y. May 12, 2009), ECF No. 1 ¶ 34 (alleging that Harley invested "over two billion dollars with BLMIS" between 1996 and the filing of the SIPA liquidation); *id.* Ex. 1 (alleging approximately $1.1 billion in total transfers from BLMIS to Harley).

[8] BNPP Arbitrage recognizes that the Trustee's claims pertain entirely to two-year transfers sought under section 548(a)(1)(A), however, as explained above, the Trustee cannot rely on the so-called "Ponzi scheme presumption" to avoid his pleading burden under section 548(a)(1)(A) and thereby escape the application of the section 546(e) safe harbor. *See supra* § IV.

A. *The Underlying Transaction Was Made in Connection With a "Securities Contract"*

The Amended Complaint is largely inscrutable, containing almost no facts tying the alleged transfers to specific transactions. Based on the barebones allegations, the only plausible transactions through which the alleged transfers could have been made are either a credit facility or a subscription and redemption of Harley shares—in both cases the transfers were made in connection with "securities contracts" under section 741(7)(A) and therefore fall under the section 546(e) safe harbor. *See* Am. Compl. § VI. If the Trustee is alleging the underlying transaction involved a credit facility, that credit facility is a securities contract within the meaning of the Bankruptcy Code, because it was a contract ultimately providing for the purchase and redemptions of securities. And if the Trustee is alleging the transfers were made as a consequence of the redemption of Harley shares, then the transfers were made in connection with subscription agreements and/or Harley's Articles of Association, and therefore also fit the definition of a securities contract. The definition of "securities contract" under section 741(7)(A) covers "any contract for the purchase, sale, or loan of a security," "any extension of credit for the clearance or settlement of securities transactions," and "any other agreement or transaction that is similar to an agreement or transaction" referred to elsewhere in the definition of securities contract. 11 U.S.C. § 741(7)(A). This definition is intentionally broad. *Picard v. Ida Fishman Revocable Trust* (*In re BLMIS*), 773 F.3d 411, 419 (2d Cir. 2014) (noting that Congress intended to "sweep broadly" and that "[f]ew words in the English language are as expansive as 'any' and 'similar'"); *SIPC v. BLMIS*, No. 12 MC 115 JSR, 2013 WL 1609154, at *8 (S.D.N.Y. Apr. 15, 2013) (definition of "securities contract" is broad and "includes, *inter alia*, investment fund subscriptions and redemption requests"). In *Fishman*, the Second Circuit held that BLMIS's

account agreements with customers "satisfy the broad definition of 'securities contracts'" in section 741(7)(A), which applies to section 546(e). *Fishman*, 773 F.3d at 418.

B. ***The Alleged Transfers Were "Settlement Payments"***

The alleged transfers also meet the definition of "settlement payments" pursuant to section 741(8). The Second Circuit held in *Fishman* that "each transfer in respect of" a customer's order or request to withdraw funds from BLMIS "constituted a settlement payment." *Fishman*, 773 F.3d at 417, 422–23. Though here, the Trustee's Amended Complaint is too vague to clearly tie the transfers to any specific credit facility agreements or redemption requests, he has seemingly alleged that Harley received approximately $1,066,800,000 in respect of such withdrawal orders or requests. Am. Compl. ¶ 84. Precisely as in *Fishman*, it is indisputable that these all fit within the definition of "settlement payments" for section 546(e) purposes.

C. ***The Alleged Transfers Were Made by and to Covered Entities Under Section 546(e)***

The transfers at issue in the Amended Complaint were also made by, to, and for the benefit of covered entities under section 546(e). The Initial Transfers were made by an entity covered by section 546(e), because they were made by a stockbroker (BLMIS). The Bankruptcy Code defines "stockbroker" to include entities "engaged in the business of effecting transactions in securities." 11 U.S.C. § 101(53A)(B). As Judge Rakoff concluded a decade ago, BLMIS easily clears this bar. *SIPC v. BLMIS*, 476 B.R. 715, 719 (S.D.N.Y. 2012), *aff'd*, 773 F.3d 411 (2d Cir. 2014) ("[E]ven assuming the truth of the allegation that Madoff Securities' investment advisory division never traded securities on behalf of clients, Madoff Securities nonetheless qualifies as a stockbroker by virtue of the trading conducted by its market making and proprietary trading divisions."). As the Second Circuit subsequently observed, "[i]t is not disputed [by the Trustee] that BLMIS was a 'stockbroker' for the purposes of § 546(e)."

Fishman, 773 F.3d at 417. The fact that the Initial Transfers were made by a stockbroker independently satisfies the section 546(e) requirement.

The transfers were also made to, or "for the benefit of" BNPP Arbitrage, a financial institution. The Code defines "financial institution" to include not only "an entity that is a commercial or savings bank," or a "trust company," but also the customer of a bank "when [the bank] is acting as agent or custodian for a customer . . . in connection with a securities contract." 11 U.S.C. § 101(22)(A). *See In re Trib. Co. Fraudulent Conv. Litig.*, 946 F.3d 66, at 78–79 (2d Cir. 2019) (for purposes of section 101(22)(A), "customer" must be given its ordinary meaning, including "someone who buys goods or services" and "a person . . . for whom a bank has agreed to collect items") (citations omitted). Under this broad definition, BNPP Arbitrage—a subsidiary of BNPP that provides broad financial services, including investment management, issuance of shares, and the holding of assets—is considered a financial institution.[9] Therefore, insofar as the Amended Complaint alleges that Harley's transfers to BNPP Arbitrage were tied to payments of customer property transferred from BLMIS to BNPP Arbitrage, the alleged Initial Transfers were settlement payments for the benefit of a financial institution and are therefore subject to the section 546(e) safe harbor. *See SIPC v. BLMIS*, 2013 WL 1609154, at *9 (*Cohmad*).

D. ***No Other Exception to the Safe Harbor Applies***

The limited, judicially created exception to section 546(e) for entities that had actual knowledge of the voidability of the transfers does not apply under these circumstances. In addition to the statutory requirements previously discussed, all of which are met here, the Court

[9] *See* Declaration of Thomas S. Kessler in Support of the Fairfield Defendants' Consolidated Motion to Dismiss, *Fairfield Sentry Limited (In Liquidation) v. Theodoor GGC Amsterdam, et al.*, Adv. Pro. No. 10-04098 (Bankr. S.D.N.Y. Mar. 23, 2020), ECF No. 55 (evidencing BNPP Arbitrage is a financial institution).

has recognized a limited, judicially imposed exception to section 546(e) where a transferee has actual knowledge of the fraud. *Picard v. Fairfield Inv. Fund (In re BLMIS)*, No. 08-01789, Adv. Pro. No. 09-01239, 2021 WL 3477479, at *4 (Bankr. S.D.N.Y. Aug. 6, 2021) (quoting *Cohmad*, 2013 WL 1609154, at *7).

Here, the Trustee has declined to allege that Harley had knowledge of the fraud, which renders wholly inapplicable any readings of this exception that purport to bar a subsequent transferee from raising the section 546(e) defense under circumstances where the initial transferee had actual knowledge of the voidability of the transfers. *See SIPC v. BLMIS*, 641 B.R. 78, 92 (Bankr. S.D.N.Y. 2022). As discussed above, the Trustee has made no such allegations of actual knowledge with respect to BNPP Arbitrage, and the safe harbor therefore bars the Trustee's claim. *See supra* § III. B. at 12.

Additionally, in *Multi-Strategy Fund*, the District Court observed that section 546(e) may be applicable regardless of the feeder funds' alleged knowledge of the fraud by virtue of the separate securities contract between the feeder funds and the subsequent transferee (here BNPP Arbitrage). *Picard v. Multi-Strategy Fund Ltd.*, No. 22-cv-06502 (JSR), 2022 WL 16647767, at *8 (S.D.N.Y. Nov. 3, 2022). In other words, where the Initial Transfers between BLMIS and the feeder funds "were made 'in connection with,' meaning they were clearly related to, securities contracts between [the funds] and [their] financial institution or financial participant clients," section 546(e) may also apply. *Multi-Strategy Fund Ltd.*, 2022 WL 2137073, at *9. This is clearly the case for each of the Subsequent Transfers. As discussed above, the transfers were made pursuant to "securities contracts" within the meaning of section 546(e), whether in the form a credit facility, or redemption of Harley shares. *See supra* § V. A. at 17. As a result, the Initial Transfers were made "in connection with" securities contracts between Harley and

BNPP Arbitrage, and, based on nothing more than his own allegations, section 546(e) operates to bar the Trustee's claim.

CONCLUSION

For all of the foregoing reasons, the Court should grant BNPP Arbitrage's motion to dismiss the Amended Complaint with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(b)(2).

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Respectfully submitted,

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